

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 23-2004:

EKALAKA TEACHERS' ASSOCIATION, MEA-MFT, NEA,)	Case No. 1475-2004
)	
)	
Complainant,)	
)	
vs.)	
)	
EKALAKA UNIFIED BOARD OF TRUSTEES AND WADE NORTHROP, SUPERINTENDENT (ELEMENTARY DISTRICT AND HIGH SCHOOL DISTRICT),)	
)	
)	
Defendants.)	

* * * * *

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDED ORDER**

* * * * *

I. INTRODUCTION

On January 5, 2004, the Ekalaka Teachers' Association filed a charge with the Board alleging that the Ekalaka Unified Board of Trustees and Wade Northrop had failed to bargain in good faith when they paid Jeff Savage \$2,000.00 for moving expenses without bargaining with the association. On February 13, 2004, the defendants filed a response to the charge denying that their actions constituted an unfair labor practice.

On April 29, 2004, an investigator for the Board issued a finding that the charges had probable merit and transferred the case to the Hearings Bureau for a hearing on the charges.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on August 12, 2004. Richard Larson represented the association. Debra A. Silk represented the defendants. Wade Northrop, Lora Tauck, Sherry Roberts, Sharon Carroll, Valerie O'Connell, and Maggie Copeland testified as witnesses in the case. Exhibits J-1 through J-5 were admitted into evidence, pursuant to the stipulation of the parties. The association's exhibits 1- 3 were admitted over defendant's objection that they were not timely filed.

The parties filed post-hearing briefs on September 21, 2004. At that time, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether Ekalaka Unified Board of Trustees and Wade Northrop, Superintendent, committed unfair labor practices in violation of Mont. Code Ann. § 39-31-401, as alleged in the complaint filed by Ekalaka Teachers' Association, MEA-MFT, NEA.

III. FINDINGS OF FACT

1. Ekalaka Teachers' Association, MEA-MFT/NEA is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6).
2. Ekalaka Unified Board of Trustees (the districts) and Wade Northrop are "public employers" within the meaning of Mont. Code Ann. § 39-31-103(10).
3. The association is the exclusive representative of teachers in the Ekalaka Public Schools.
4. At all relevant times, Northrop was the superintendent of Ekalaka Public Schools.
5. The association and the districts have had an enforceable collective bargaining agreement in effect at all relevant times.
6. Jeff Savage was employed as a teacher/coach by the districts for the 2003-04 school year.
7. Savage was living in Washington state when he applied for the position in Ekalaka. Sometime prior to the districts' formal offer of employment to Savage, Northrop had a conversation with him about his interest in the position. He told Northrop that relocating to Ekalaka would cost him \$2,000.00 and he asked to be reimbursed for those costs.
8. Northrop directed the district clerk, Lora Tauck, to issue a check to Savage in the amount of \$2,000.00, for his moving expenses. Tauck prepared the check, which was dated June 29, 2003.
9. The Board of Trustees of the districts met for a special board meeting on June 30, 2003.
10. Upon the recommendation of Northrop, the Board of Trustees moved to offer Savage a teaching position and other extra-duty assignments as reflected in the June 30, 2003, board minutes.
11. Savage accepted the offer of employment and signed a teacher's employment contract with the district on July 1, 2003.

12. Neither Northrop or any other representative of the districts notified the association that the districts planned to pay Savage for his moving expenses prior to delivering the check to him. The association learned of the payment to Savage in approximately mid-October 2003.

13. On or about July 15, 2003, Northrop made a tentative offer of employment to Sherry Roberts. Roberts visited Ekalaka and during her visit, asked Northrop whether the districts might reimburse her moving expenses from Minnesota to accept the position in Ekalaka. Northrop declined her request for moving expenses on the ground that he could not pay her more than the salary provided for in the collective bargaining agreement.

14. On July 28, 2003, the Board of Trustees held a special meeting to consider the recommendation of the interview committee to hire Roberts. The Board voted to hire her, contingent on a successful background investigation and acquisition of a Montana teaching license.

IV. DISCUSSION¹

The association contends that the payment of \$2,000.00 to Jeff Savage constituted a unilateral change in working conditions as embodied in the collective bargaining agreement between the association and the Unified Board of Trustees of Ekalaka Elementary School District #15 and Carter County High School and reflected direct dealing (or individual bargaining) between the districts and Savage.

The defendants contend that the payment to Savage was a pre-employment incentive and that districts are not required to bargain over pre-employment conditions or incentives. The defendants further contend that the association waived its right to bargain over the issue by failing to request bargaining, and that pre-employment conditions are inherent management rights. Therefore, the districts request that the unfair labor practice charge brought by association be dismissed with prejudice.

Montana law requires public employers and labor organizations representing their employees to bargain in good faith on issues of wages, hours, fringe benefits, and other conditions of employment. Mont. Code Ann. § 39-31-301(5). Failure to bargain collectively in good faith is a violation of Mont. Code Ann. § 39-31-401(5). The Montana Supreme Court has approved the practice of the Board of Personnel Appeals of using federal court and National Labor Relations Board (NLRB) precedent as guidance in interpreting Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

The basic, fundamental purpose of labor relations is good faith negotiation of the mandatory subjects of bargaining--wages, hours, and other terms and conditions of employment. For an employer to make unilateral changes during the course of a collective bargaining relationship concerning mandatory subjects of bargaining is considered a violation of the requirement of good faith bargaining. *NLRB v. Katz* (1962), 369 U.S. 736. Absent waiver or other relief from the obligation, it continues during the term of the collective bargaining agreement. *NLRB v. Sands Mnftng. Co.* (1939), 306 U.S. 332, 342. Engaging in direct dealings with members of a collective bargaining unit also constitutes a refusal to bargain collectively in good faith. *Medo Photo Supply v. NLRB* (1944), 321 U.S. 678, 683-85.

The defendants contend that at the point they paid the \$2,000.00 in moving expenses to Savage, he was not an employee. Thus, the defendants were not required to bargain with the union concerning the payment to Savage. Defendants rely on *Allied Chemical & Alkalai Workers v. Pittsburgh Plate Glass Co.* (1971), 404 U.S. 157 and *Star Tribune Division* (1989), 295 NLRB 543 and its progeny in support of the argument that it did not have to bargain the pre-employment payment of moving expenses to Savage. These were the exact arguments presented by the defendants in their motion for summary judgment, and rejected by the hearing officer in ruling on that motion.

¹Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

In *Pittsburgh Plate Glass*, the Supreme Court held that retirees' health insurance benefits were not a mandatory subject of bargaining as "terms and conditions of employment" of the retirees themselves, and the employer's unilateral midterm modification of the health plan for already retired employees was not an unfair labor practice. In *Star Tribune* and its progeny, the NLRB held that the employer was not required to bargain with the union over pre-employment drug and alcohol testing. The defendants contend these cases establish that employers need not bargain over issues related to non-employees. However, the critical question in these cases was whether the subject was a term or condition of employment, not whether the individuals affected were employees. The payment in this case is comparable neither to retiree medical benefits nor to a hiring process for applicants.

In this case, for purposes of determining if a bargaining obligation existed, whether Savage was an employee at the point the defendants paid him the \$2,000.00 is irrelevant. Had the districts agreed to pay Savage a higher salary than that called for in the collective bargaining agreement prior to him becoming an employee, the timing of the agreement or the payment would not insulate the action of the districts. *Cf.*, *Monterey Newspapers, Inc.* (2001), 334 NLRB 1019, 1020, in which the Board stated: "We agree with the judge that the wage rates that job applicants were offered (and, thus, that newly hired employees were paid) are mandatory subjects of bargaining."² The question is whether the payment to Savage constituted wages, fringe benefits, or other conditions of employment, because these are the issues about which employers are required to bargain under state law.

The payment was additional compensation to Savage, a soon-to-be employee. The districts paid him this additional compensation because the salary available under the collective bargaining agreement was insufficient to attract him to the districts without an additional incentive. Whether the districts characterize the payment as moving expenses or as a pre-employment incentive, they offered it because the bargained-for salaries were insufficient to insure Savage would accept the job. Because the payment to Savage represented compensation, it was clearly a term or condition of employment, and a subject of mandatory bargaining.

The defendants made much of the timing of the payment to Savage. Northrop testified that he had not offered employment to Savage at the time he gave him the check, and that the payment was in the nature of a gift that the districts would not have been able to recover if Savage decided not to take the job. He testified he was not authorized to offer employment to a candidate until the Board acted, and so could not have offered employment before June 30, 2003.

Northrop's testimony on this point is not credible. Savage did not testify, but it is inherently incredible that Northrop agreed to give \$2,000.00 of the money of cash-strapped school districts to an applicant for employment without some understanding, however implicit, that he would actually come to work for the districts. Further, Roberts credibly testified that after her telephone interview with Northrop and several board members, Northrop called her back and told her that the districts were offering her the position, but that they would like her to

²The Board reversed the judge on other grounds specifically relating to the bargaining obligations of a successor employer.

come to the town and see it. Also, the district prepared Roberts' contract of employment on September 15, 2003, but the Board did not approve her hire until September 28, 2003.

It is a much more probable scenario for both Savage and Roberts that Northrop made a tentative offer of employment to these applicants, contingent on them coming to Ekalaka to see the town and on approval by the Board. Because it was made in connection with a tentative offer of employment, the payment to Savage represented additional compensation to him.³

Even when the payment to a non-employee is not itself a term or condition of employment, if the payment vitally affects the terms and conditions of bargaining unit member employment, the employer is obligated to bargain with the union. *Pittsburgh Plate Glass, supra*, at 179. There are very few reported cases on the issue of bargaining pre-employment incentives. However, in a recent case, an NLRB administrative law judge expressly held that an employer is obligated to bargain over sign-on and relocation bonuses, stating:

Although applicants are not "employees" for purposes of Section 8(a)(5) of the Act, the sign-on and relocation bonuses paid to applicants, when they become employees, are wages. Thus, the sign-on and relocation bonuses have more than an "indirect or incidental impact on unit employees." Because the subject of new hire wages "materially or significantly affects unit employees' terms and conditions of employment," Respondent was required to bargain regarding the sign-on and relocation bonuses. Finally, the Union did not clearly and unmistakably waive the right to bargain by agreeing to management rights clauses that ceded generally to Respondent the right to hire. Thus I find that Respondent violated the Act by unilaterally granting sign-on and relocation bonuses to applicants for employment without prior notice to the Union, by dealing directly with employees regarding these sign-on and relocation bonuses, and by refusing to bargain with the Union regarding sign-on bonuses and relocation bonuses to be offered to applicants for employment. Finally, I find that Respondent bypassed the Union and dealt directly with unit employees regarding the sign-on bonuses and relocation bonuses and a transfer bonus.

St. Vincent Hospital, 2004 NLRB LEXIS 442, 11-12 (footnotes omitted).

St. Vincent Hospital is directly on point, both for the bargaining question and for the management rights question. Since this was a matter over which the districts were obligated to bargain, they did not have an inherent management right based either on statute or the general management rights language of the collective bargaining agreement.

The defendants also contend that the association waived its right to bargain over the issue of this pre-employment incentive. They cited no additional authority for this contention beyond that rejected by the hearing officer in ruling on the motion for summary judgment.

³The defendants also argued that the payment was not wages because they did not report it as wages for tax purposes. This argument is irrelevant to how the payment is properly characterized.

It is true that when an employer notifies the union of a proposed change, and the union fails to request bargaining, the union has waived bargaining on the issue. *See, e.g., Haddon Craftsmen, Inc.* (1990), 300 NLRB 789, 790, **review den. sub nom.** *Graphic Communications Internat., Local Union No. 97B v. NLRB* (3rd Cir. 1991), 937 F.2d 597. However, there is no evidence that the districts or Northrop notified the association of their intent to pay an additional \$2,000.00 to Savage at any time before Northrop delivered the payment to Savage. The association did not learn of the payment until sometime in October. Because defendants gave no notice of a proposed change, the association could not have and did not waive its right to bargain the issue.

The defendants cite several decisions of the Board on the issue of waiver, *Beaverhead Federation of Teachers v. Beaverhead County High School*, ULP 10-2001 (October 29, 2002) and *Browning Federation of Teachers v. Browning Public Schools*, ULP 17-2001 (November 26, 2001). The facts of these cases are significantly different from the present case. In both cases, the complainants had actual knowledge of the actions of the defendants, and did not request bargaining. In *Browning*, the defendant had paid pre-employment incentives to prospective employees over a period of several years with actual knowledge of bargaining unit members before the union filed its unfair labor practice charge.⁴ In *Beaverhead*, the defendant had public discussions of its proposal to change the schedule of the traffic education course. These discussions occurred at Board meetings at which union members were present. No similar facts supporting a finding of a waiver are present in this case.

Mont. Code Ann. § 39-31-406(4) provides that when the Board finds an employer has engaged in an unfair labor practice, the Board shall order the employer to cease and desist from the unfair labor practice, and to take such affirmative action as will effectuate the policies of the Collective Bargaining Act. Thus the appropriate remedy for the districts' failure to bargain in good faith is an injunction against making unilateral changes in terms and conditions of employment, an order to bargain with the association about pre-employment incentives, and a posting requirement.

The association requested that the Board order the districts to pay \$2,000.00 to each of the bargaining unit members. The defendants contend that since the \$2,000.00 in this case was intended to reimburse Savage for his moving expenses, such an order would be inappropriate and not supported by the record. Neither party presented any authority on whether an equivalent payment is appropriate for each bargaining unit member when the employer has bargained directly with an employee. The hearing officer has found no authority to support such an award. However, an award of \$2,000.00 is appropriate for Roberts, the other prospective employee who requested reimbursement of moving expenses in the same time frame as Savage and was thus similarly situated to him.

⁴On the question of the duty to bargain pre-employment incentives, the Board in the *Browning* case expressly rejected a finding of the Board's investigator that the Board had no duty to bargain such incentives.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this case. Mont. Code Ann. § 39-31-207.

2. A public employer may not refuse to bargain collectively in good faith on questions of wages, hours, fringe benefits, and other conditions of employment with an exclusive representative of its employees. Mont. Code Ann. §§ 39-31-305 and 39-31-401(5). An employer that makes unilateral changes during the course of a collective bargaining relationship concerning wages, hours, fringe benefits, and other conditions of employment has refused to bargain in good faith. *NLRB v. Katz* (1962), 369 U.S. 736.

3. The pre-employment incentive paid to Jeff Savage was additional compensation to him and a condition of employment about which the Ekalaka Unified Board of Trustees and Wade Northrop were required to bargain with the Ekalaka Teachers' Association prior to agreeing to pay the incentive to Savage.

4. By agreeing to pay the pre-employment incentive to Savage without bargaining with the Ekalaka Teachers' Association, the Ekalaka Unified Board of Trustees and Wade Northrop unilaterally changed Savage's compensation under the collective bargaining agreement, engaging in direct dealing with Savage. They committed an unfair labor practice in violation of Mont. Code Ann. § 39-31-401(5).

5. As a result, the Ekalaka Teachers' Association is entitled to cease and desist orders, an order directing the defendants to bargain with the association about pre-employment incentives for employees, an order to post and publish the notice set forth in Appendix A, and an order to pay Sherry Roberts the sum of \$2,000.00.

VI. RECOMMENDED ORDER

Ekalaka Unified Board of Trustees and Wade Northrup are hereby **ORDERED**:

1. Immediately to cease the practice of offering pre-employment incentives for employees or otherwise unilaterally altering terms and conditions of employment subject to the collective bargaining agreement without bargaining with the Ekalaka Teachers' Association;

2. Within 30 days of this order:

a. To initiate collective bargaining with the Ekalaka Teachers' Association, about pre-employment incentives for employees; and

b. To pay Sherry Roberts the sum of \$2,000.00;

c. To post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted, at the Ekalaka Schools for a period of 60 days and to take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material.

DATED this 4th day of January, 2005.

BOARD OF PERSONNEL APPEALS

By: /s/ ANNE L. MACINTYRE
Anne L. MacIntyre, Chief
Hearings Bureau
Department of Labor and Industry

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than January 27, 2005. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

Richard Larson
Attorney at Law
P.O. Box 1152
Helena, MT 59624

Debra Silk
Montana School Boards Association
One South Montana Avenue
Helena, MT 59601

DATED this 4th day of January, 2005.

/s/ SANDY DUNCAN

APPENDIX A

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE STATE OF MONTANA
BOARD OF PERSONNEL APPEALS**

The Montana Board of Personnel Appeals has found that we violated the Montana Collective Bargaining for Public Employees Act and has ordered us to post and abide by this notice.

We will not fail to bargain in good faith with the Ekalaka Teachers' Association;

We will not offer pre-employment incentives or otherwise unilaterally change the terms and conditions of employment of employees covered by the collective bargaining agreement with the Ekalaka Teachers' Association without prior negotiations with the Association;

We will engage in negotiations with the Ekalaka Teachers' Association over pre-employment incentives for employees.

DATED this _____ day of January, 2005.

Ekalaka Unified Board of Trustees

By: _____

Wade Northrop

RICHARD LARSON
ATTORNEY AT LAW
PO BOX 1152
HELENA MT 59624

DEBRA SILK
MONTANA SCHOOL BOARDS ASSOCIATION
ONE S MONTANA AVE
HELENA MT 59601

1
2
3 **BOARD OF PERSONNEL APPEALS**
4 **PO BOX 6518**
5 **HELENA MT 59604-6518**
6 **Telephone: (406) 444-2718**
7 **Fax: (406) 444-7071**

8 **STATE OF MONTANA**
9 **BEFORE THE BOARD OF PERSONNEL APPEALS**

10 **IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 23-2004 (Case No. 1475-2004):**

11 **EKALAKA TEACHERS' ASSOCIATION, MEA-MFT, NEA,**

12 **Complainant**

13 **- vs -**

14 **EKALAKA UNIFIED BOARD OF TRUSTEES AND WADE NORTHROP,**
15 **SUPERINTENDENT (ELEMENTARY DISTRICT AND HIGH SCHOOL**
16 **DISTRICT),**

17 **Defendant.**

18 **FINAL ORDER**

19 *****

20 The above-captioned matter came before the Board of Personnel Appeals (Board) on May 26, 2005. The
21 matter was before the Board for consideration of the Notice of Exceptions filed by Debra A. Silk, attorney for the
22 Defendants, to the Findings of Fact; Conclusions of Law; and Recommended Order issued by Anne L. MacIntyre,
23 Bureau Chief, Hearings Bureau, dated January 4, 2005.

24 Debra A. Silk, attorney for the Defendants, and Richard Larson, attorney for the Complainant, appeared
25 in person. After review of the record and consideration of the arguments by the parties, the Board concludes and
26 orders as follows:

27 1. IT IS HEREBY ORDERED that the Complainant's Notice of Exceptions to Findings of Fact,
28 Conclusions of Law and Recommended Order is dismissed.

2. IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended
Order are affirmed with the following exceptions and substitutions:

A. Paragraph VI.1. of the Recommended Order is hereby excepted and deleted from the
decision and the following language substituted in its place: "Immediately to cease the
practice of offering pre-employment incentives to potential employees who would be covered
by the collective bargaining agreement, or otherwise unilaterally altering the terms and
conditions of employment subject to the collective bargaining agreement, without bargaining
with the Ekalaka Teachers' Association;" and

B. Paragraph VI.2.b. is hereby excepted and deleted from the decision.

1
2 DATED this 5th day of June, 2005.

3
4 BOARD OF PERSONNEL APPEALS

5
6 By: 

Jack Holstrom
Presiding Officer

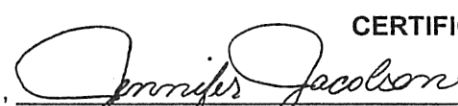
7
8 *****
Board members Holstrom, Reardon, Audet, Johnson and Alberi concur.
9 *****

10
11 *****
12 NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a
13 petition for Judicial Review with the District Court no later than thirty (30) days from the service of
14 this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

15 *****

16 *****

17 CERTIFICATE OF MAILING

18 I, , do hereby certify that a true and correct copy of this
19 document was mailed to the following on the 9th day of June, 2005:

20 DEBRA A. SILK
ATTORNEY FOR DEFENDANTS
MONTANA SCHOOL BOARDS ASSOCIATION
21 ONE SOUTH MONTANA AVENUE
HELENA MT 59601

22 RICHARD LARSON
23 ATTORNEY AT LAW
PO BOX 1152
24 HELENA MT 59624-1152

25 *****
26
27
28

RECEIVED

JAN 24 2006

Standards Bureau

CLERK OF DISTRICT COURT

2006 JAN 23 A 10 30

T. DILLMAN
BY DEPUTY

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

EKALAKA UNIFIED BOARD OF
TRUSTEES and WADE NORTHRUP,
SUPERINTENDENT (Elementary
District and High School District),

Petitioners,

v.

EKALAKA TEACHERS'
ASSOCIATION, MEA-MFT, NEA,

Respondents.

Cause No. ADV-2005-457

DECISION AND ORDER

This is a petition for judicial review of a final order of the Montana Board of Personnel Appeals. The matter has been submitted on the briefs and the administrative record.

BACKGROUND

This action stems from the payment of moving expenses to a future teacher of the Ekalaka School District. On January 5, 2004, Respondent Ekalaka Teachers' Association (hereinafter Teachers Union) filed with the Board of Personnel Appeals an unfair labor practice charge against the Ekalaka Unified Board of Trustees

1 (hereinafter School District). The matter was assigned to a hearings officer, who denied
2 the School District's motion for summary judgment. A contested case hearing was held
3 on August 12, 2004. On January 4, 2005, the hearings examiner issued Findings of fact,
4 conclusions of law and recommended order in favor of the Teachers Union. The School
5 District filed a notice of exception. On January 8, 2005, the Board of Personnel
6 Appeals issued its final order denying the exception and adopting the hearings
7 examiner's recommended order with minor changes. The School District now seeks
8 judicial review of that final order.

9 UNDISPUTED FACTUAL BACKGROUND

10 In 2003, Jeff Savage submitted an employment application to the School
11 District for a teaching position in history and physical education. At that time, Savage
12 was living in the state of Washington. On June 10, 2003, Savage had a telephone
13 interview with the hiring committee, which consisted of three school board members
14 and Wade Northrop, the School District superintendent. During the interview, Savage
15 was informed of the salary and benefits of the teaching position. Sometime after the
16 interview, the committee determined that Savage was the best candidate for the position,
17 and Savage learned that the School District was interested in hiring him. In a telephone
18 conversation with Northrop, Savage indicated that if he were to relocate to Ekalaka, he
19 needed to be reimbursed for his moving expenses in the amount of \$2,000. Northrop
20 again talked to Savage by telephone, and the two agreed that when Savage came to
21 Ekalaka to look at the school and community, Northrop would pay him then.

22 During the week of June 16, 2003, Northrop directed a School District
23 employee to issue a check to Savage in the amount of \$2,000. A check, dated June 29,
24 2003, was made out to Savage in the amount of \$2,000 and given to Savage on that day.
25 On June 30, 2003, at a special meeting of the school board, Northrop recommended

Savage for the job. The Board voted to accept the recommendation to offer the teaching position to Savage. On July 1, 2003, Savage signed a teaching contract with the School District.

Upon his employment, Savage began being paid a salary in accordance with a collective bargaining agreement that applied to the teachers in the district.

The collective bargaining agreement did not address payment of moving expenses, hiring incentives or pre-employment incentives to future employees.

DISCUSSION

Standard of Review

The standard of review of an administrative agency's findings of fact is whether the findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Section 2-4-704(2)(a)(v), MCA; *Mont. Dep't of Revenue v. United Parcel Serv.*, 252 Mont. 476, 479, 830 P.2d 1259, 1261 (1992). The Montana Supreme Court adopted the three-part test in *Interstate Prod. Credit Ass'n v. DeSaye*, 250 Mont. 320, 820 P.2d 1285 (1991), to determine if an agency's findings of fact are clearly erroneous. Under that test, the court will first review the record to determine if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, the reviewing court should determine if the trier of fact has misapprehended the effect of evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, a finding may still be clearly erroneous "when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." *Id.*

Substantial evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence

1 but may be somewhat less than a preponderance." *Marriage of Schmitz*, 255 Mont. 159,
2 165, 841 P.2d 496, 500 (1992).

3 The standard for reviewing an administrative agency's conclusions of law
4 is whether the agency's interpretation of the law is correct. *Steer, Inc. v. Dep't of*
5 *Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990); *Baldrige v. Rosebud*
6 *County Sch. Dist. 19*, 264 Mont. 199, 205, 870 P.2d 711, 714 (1994).

7
8 1. **Whether the Agency's Findings of Fact Were Relevant or Supported
by Substantial Evidence**

9 The School District argues that some of the findings of fact were not
10 supported by the record or not relevant to the proceedings. Specifically, the School
11 District challenged:

12 Finding of Fact 13: That finding stated:

13 On or about July 15, 2003, Northrop made a tentative offer of
14 employment to Sherry Roberts. Roberts visited Ekalaka and during her
15 visit, asked Northrop whether the districts might reimburse her moving
16 expenses from Minnesota to accept the position in Ekalaka. Northrop
declined her request for moving expenses on the ground that he could not
pay her more than the salary provided for in the collective bargaining
agreement.

17 The School District argues that this finding is irrelevant. The Court
18 disagrees. This finding is pertinent to the School District's credibility and motives, as
19 well as to the solution of the dispute.

20 The Hearings Examiner's Statement of the Parties' Contentions

21 The hearings examiner's discussion, according to her footnote 1 on page
22 4, include and incorporate supplemental findings of fact.

23 Paragraph 1 of the Discussion

24 Although the School District challenged this language, it consists only of
25 the hearing examiner's statements as to the contention of a party and does not constitute

1 findings of fact.

2 Paragraph 5 of the Discussion

3 This disputed portion of the discussion is legal analysis and does not
4 constitute findings of fact.

5 Paragraph 6 of the Discussion

6 This disputed portion of the discussion is legal analysis and does not
7 constitute findings of fact.

8
9 **2. Whether the Hearing Examiner Erroneously Denied the School District's Motion for Summary Judgment**

10 The School District argues that the undisputed evidence entitled it to
11 judgment as a matter of law, and that the Teachers Union failed to meet its burden of
12 proof.

13 The undisputed facts upon which the motion was based are that Savage
14 informed Northrop that he wanted moving expense reimbursement of \$2000; that the
15 check for this amount was given to him a few days before Savage signed his contract with
16 the School District; and that the teaching job was not formally offered to Savage until
17 after he received the check. The hearing examiner's findings indicate additional facts
18 that justify her refusal to grant summary judgment. For example, Finding of Fact 7 states
19 that prior to the School District's formal offer of employment to Savage, Northrop had a
20 conversation with him about his interest in the position, and Savage indicated "that
21 relocating to Ekalaka would cost him \$2,000 and he asked to be reimbursed for those
22 costs." Her additional findings of fact pertain to Sherry Roberts' request for moving
23 expense reimbursement. These findings are supported by the record and support the
24 hearing examiner's findings that Savage was more than a mere job applicant, but had a
25 reasonable and immediate expectation of employment at the time he was given the

1 \$2,000. The record supports her finding that Northrop's testimony was not credible
2 when he stated that he did not offer Savage the job, even tentatively, before he gave
3 Savage the \$2,000. The evidence was sufficient to allow the hearing examiner to infer
4 and ultimately find that prior to receiving the \$2,000, Savage had received a tentative
5 offer of employment – that it was understood between the parties that with the payment
6 of \$2,000 for moving expenses, Savage would move to Ekalaka to teach at the school.
7 Thus, the \$2,000 constituted compensation in addition to the teaching salary under the
8 collective bargaining agreement.

9
10 3. Whether the School District Failed to Follow the Statutory
Requirement to Conduct an Investigation.

11 The School District alleges that the Board of Personnel Appeals failed in
12 its duty to investigate the Teachers Union's claim, citing section 39-31-405, MCA,
13 which sets forth the agency's procedure when a charge is filed. An exhibit to the School
14 District's opening brief indicates that an investigative report was, in fact, prepared. The
15 School District did not raise this issue in the administrative proceedings, nor has it
16 demonstrated any particular legal insufficiency in the report.

17 4. Whether the Hearing Examiner's Conclusions of Law Are Correct

18 The issue is whether the School District was required to work through the
19 union before paying Savage the moving expense. This raises the question of whether
20 Savage was an employee for purposes of the collective bargaining agreement. As
21 counsel noted, there are few cases on point, although counsel cited several cases
22 touching on the definition of "employee" under the National Labor Relations Act
23 (NLRA). *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157
24 (1971), addressed the status of retirees for purposes of collective bargaining obligations
25 under the NLRA. The question was whether the employer was required to collectively

1 bargain modifications in retirees' benefits. In ruling that collective bargaining was not
2 required, the Court acknowledged that retirees were not "employees" under the ordinary
3 meaning of that term, since they were no longer working for hire and had little
4 expectancy of resuming their former employment. The Court also concluded that the
5 retirees were not employees for purposes of the NLRA, because they did not share a
6 community of interests broad enough to be included in the bargaining unit. *Id.* at 173. In
7 its lengthy discussion, the Court noted that existence or lack of an ordinary employer-
8 employee relationship was not necessarily the exclusive determinant as to whether an
9 issue was a mandatory subject of collective bargaining under the NLRA. Another factor
10 is whether the subject of the dispute "vitally affects the 'terms and conditions' of
11 [bargaining unit employees'] employment. *Id.* at 179.

12 *NLRB v. Nat'l Casket Co., Inc.*, 107 F.2d 992 (2nd Cir. 1939) involved the
13 application of several former employees for reinstatement of their jobs after the
14 enactment of the NLRA, which would affect the amount of back pay. The former
15 employees alleged that their termination was the result of unfair labor practices under
16 the NLRA. The Court held that the former employees were not covered by the NLRA
17 because their employment with the company was so far in the past, they were merely
18 applicants rather than employees. *Id.* at 997. The Court quoted from *NLRB v. Jones &*
19 *Laughlin Steel Corp.*, 301 U.S. 1 (1937):

20 The act does not interfere with the normal exercise of the right of the
21 employer to select its employees or to discharge them. The employer
22 may not, under cover of that right, intimidate or coerce its employees with
23 respect to their self-organization and representation, and, on the other
hand, the Board is not entitled to make its authority a pretext for
interference with the right of discharge when that right is exercised for
other reasons than such intimidation or coercion.

24 *Nat'l Casket*, at 997.

25 *St. Vincent Hosp. v. NLRB*, 2004 NLRB LEXIS 442 (Aug. 4, 2004), is an

1 administrative law judge decision and is of limited precedential value. However, it
2 provides some illumination into application of employee status under the NLRA. The
3 case involved a collective bargaining unit consisting of nurses employed by St. Vincent
4 Hospital in New Mexico. The hospital gave sign-on and relocation bonuses to several
5 nurse applicants without involving the union. The court held that although the applicants
6 were not “employees” under the NLRA, the bonuses paid to them after they became
7 employees were still wages, and the bonuses had more than an “indirect or incidental
8 impact on the unit employees.” *Id.* at 11. The court held that the hospital violated the
9 collective bargaining agreement.

10 Applicants for employment have been included within the definition of
11 “employees” and are protected under the NLRA from discriminatory hiring practices.
12 *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941); *NLRB v. Town & Country*
13 *Elec.*, 516 U.S. 85, 87-88 (1995).

14 Based on the available decisional authority, the Court concludes that
15 although Savage was technically not an “employee” within the ordinary meaning of that
16 term, the parties’ expectation of Savage’s immediate employment and his becoming an
17 employee within days of receiving the \$2,000 had a direct impact on the members of the
18 bargaining unit. The \$2,000 was compensation over and above the salary set forth in the
19 collective bargaining agreement. The School District therefore violated the collective
20 bargaining agreement by failing to involve the union.

21 /////

22 /////

23 /////

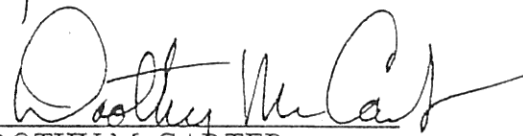
24 /////

25 /////

1 The hearing examiner's conclusions of law are correct. The challenged
2 findings of fact are supported by the record. The agency's final order is AFFIRMED.

3 IT IS SO ORDERED.

4 DATED this 23 day of January, 2006

5
6 
7 DOROTHY McCARTER
District Court Judge

8 pcs: Debra A. Silk/Tony Koenig
Richard Larson

9
10 T/DMc/ekalaka school v teacher's assoc d&o.wpd

No. DA 06-0171

IN THE SUPREME COURT OF THE STATE OF MONTANA

2006 MT 337

EKALAKA UNIFIED BOARD OF TRUSTEES
and WADE NORTHROP, SUPERINTENDENT
(Elementary District and High School District),

Petitioners and Appellants,

v.

EKALAKA TEACHERS' ASSOCIATION,
MEA-MFT, NEA,

Respondents and Respondents.

APPEAL FROM: District Court of the First Judicial District,
In and for the County of Lewis and Clark, Cause No. ADV 05-457,
The Honorable Dorothy McCarter, Presiding Judge.

COUNSEL OF RECORD:

For Appellants:

Debra A. Silk and Tony Koenig, Montana School Boards Association,
Helena, Montana

For Respondents:

Richard Larson, Harlen, Chronister, Parish & Larson, P.C., Helena,
Montana

Submitted on Briefs: October 10, 2006
Decided: December 19, 2006

Filed:

Clerk

Justice Brian Morris delivered the Opinion of the Court.

¶1 Ekalaka Unified Board of Trustees and Superintendent of Ekalaka Public Schools Wade Northrop (collectively the School District) appeal from the judgment and order of the First Judicial District Court, Lewis and Clark County, affirming the Final Order of the Board of Personnel Appeals (BOPA), determining that the School District had committed unfair labor practices. We affirm.

¶2 We review the following issue on appeal:

¶3 Was the District Court correct in affirming the Board of Personnel Appeals Final Order?

FACTUAL AND PROCEDURAL HISTORY

¶4 Jeff Savage (Savage) interviewed for a teaching position with the Ekalaka School District in 2003. Superintendent Wade Northrop (Northrop) contacted Savage sometime after the interview to gauge Savage's interest in the teaching position. Savage informed Northrop that he would need \$2,000.00 for moving expenses if he were to relocate to Ekalaka for the teaching position. Northrop agreed to deliver a \$2,000.00 check to Savage when Savage visited Ekalaka to look at the school and the community. Northrop directed the School District clerk to issue the check and Northrop then personally delivered the check to Savage on June 29, 2003. The next day Northrop recommended to the Board of Trustees that the School District formally offer Savage the teaching position. The Board of Trustees adopted the recommendation and issued a teaching contract. Savage signed the contract on July 1, 2003.

¶5 Northrop made another offer of employment to Sherry Roberts (Roberts) on or about July 15, 2003. Roberts also requested moving expenses from Northrop, but Northrop denied her request on the grounds that he could not pay her more than the salary provided in the Collective Bargaining Agreement (CBA). The Board of Trustees later voted to hire Roberts.

¶6 The Ekalaka Teacher's Association (ETA) filed a charge with BOPA alleging that the School District had failed to bargain in good faith with ETA when the school district agreed to pay Savage \$2,000.00. Hearing Officer Anne L. MacIntyre conducted a hearing in the case on August 12, 2004, and entered Findings of Fact, Conclusions of Law, and Recommended Order in favor of ETA. The School District filed a Notice of Exception to the Recommended Order. BOPA affirmed the Recommended Order with only minor revisions and issued a Final Order.

¶7 BOPA determined that "[t]he pre-employment incentive paid to Jeff Savage was additional compensation to him and a condition of employment," and, therefore, was a subject of mandatory bargaining. BOPA continued that "[b]y agreeing to pay the pre-employment incentive to Savage without bargaining with the Ekalaka Teachers' Association, the Ekalaka Unified Board of Trustees and Wade Northrop unilaterally changed Savage's compensation under the collective bargaining agreement, engaging in direct dealing with Savage." BOPA concluded that the School District had committed an unfair labor practice in violation of § 39-31-401(5), MCA.

¶8 The School District petitioned the District Court for judicial review on July 8,

2005. The District Court affirmed the Final Order, and this appeal followed.

STANDARD OF REVIEW

¶9 We review an agency's conclusions of law to determine if they are correct. *Hofer v. Montana DPHHS*, 2005 MT 302, ¶ 14, 329 Mont. 368, ¶ 14, 124 P.3d 1098, ¶ 14. We review agency findings to determine whether they are clearly erroneous. Section 2-4-704(2), MCA. The same standard of review applies to "both the District Court's review of the administrative decision and our subsequent review of the District Court's decision." *Hofer*, ¶ 14.

DISCUSSION

¶10 The Public Employees Collective Bargaining Act, §§ 39-31-101 through 505, MCA, imposes a duty on Montana public employers to bargain collectively, and in good faith, with their employees on the subjects of "wages, hours, fringe benefits, and other conditions of employment" Section 39-31-305, MCA. An employer who "refuse[s] to bargain collectively in good faith" commits an "unfair labor practice." Section 39-31-401(5), MCA.

¶11 The obligation to bargain collectively extends only to the terms and conditions of employment of current employees, and does not extend to the terms and conditions of employment conferred on non-employees. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971); *see also Star Tribune*, 295 N.L.R.B. 543, 547, 131 L.R.R.M. 1404, 1408 (1989) (holding that the terms and conditions placed on applicants are not subjects of mandatory bargaining). The terms and conditions offered

by an employer to non-employees still may be subject to mandatory bargaining, however, if they “vitally affect” the terms and conditions of employment for those employees currently working for the employer. *Pittsburgh Plate Glass Co.*, 404 U.S. at 179; *Monterey Newspapers, Inc.*, 334 N.L.R.B. 1019, 1020, 168 L.R.R.M. 1001, 1002 (2001) (noting that wage rates offered to job applicants “vitally affected” current employees and are mandatory subjects of bargaining).

¶12 It is undisputed that Savage was not an “employee” at the time the School District made the \$2,000.00 payment to Savage. Thus, we must decide whether the \$2,000.00 payment “vitally affected” the terms and conditions of employment of ETA’s members. A condition or benefit conferred on a non-employee “vitally affects” the active employees if it “materially or significantly affects unit employees’ terms and conditions of employment.” *Star Tribune*, 295 N.L.R.B. at 547, 131 L.R.R.M. at 1409. An indirect or incidental impact on unit employees, to the contrary, is not sufficient to establish a condition or benefit as a subject of mandatory bargaining. *Star Tribune*, 295 N.L.R.B. at 547, 131 L.R.R.M. at 1409.

¶13 BOPA held that the reasoning in *St. Vincent Hospital*, 2004 WL 1804091 (N.L.R.B. Div. of Judges) (2004), controls the outcome of this case. In *St. Vincent Hospital* the employer unilaterally instituted a bonus program intended to attract nurses to apply for hard to fill nursing positions. *St. Vincent Hospital*. The employer structured the bonus program so that the bonus payments would be paid in increments over the first three years of the applicant’s employment. *St. Vincent Hospital*.

¶14 The National Labor Relations Board (NLRB) determined that “[a]lthough applicants are not ‘employees’ . . . the sign-on . . . bonuses paid to the applicants, when they become employees, are wages.” *St. Vincent Hospital*. The NLRB continued that the employer was “required to bargain regarding the . . . bonuses” because “the subject of new hire wages ‘materially or significantly affects unit ‘employees’ terms and conditions of employment.’” *St. Vincent Hospital*.

¶15 We agree with BOPA that the payment to Savage should have been a subject of mandatory bargaining because the payment represents wages that “‘materially or significantly affect[] unit ‘employees’ terms and conditions of employment’” *See St. Vincent Hospital*. The \$2,000.00 payment to Savage is analogous to the bonuses paid in *St. Vincent Hospital*. In both cases the employer offered the payments to the applicants because the bargained-for salaries likely would have been insufficient to insure that the applicants would accept the job. *St. Vincent Hospital*.

¶16 The School District seeks to distinguish the payment to Savage from the bonuses in *St. Vincent Hospital*. The School District argues that the \$2,000.00 that Northrop paid to Savage cannot be considered “wages” because Northrop gave the check to Savage before Savage had signed his employment contract. By contrast, the hospital paid the bonuses in *St. Vincent Hospital* after the applicants became employees. This distinction, contends the school district, makes it easier to characterize the nurses bonuses as “wages.”

¶17 The School District misplaces its focus on the timing and labeling of the payment. ETA's bargaining interest in the \$2,000.00 payment to Savage derives from its larger interest in establishing a stable wage structure through the process of collective bargaining. *See Pittsburgh Plate Glass Co.*, 404 U.S. at 178. The School District circumvented the collective bargaining process when it bargained directly with Savage and agreed to pay him compensation beyond that agreed by ETA. The unfair labor practice occurred the moment the School District agreed to pay Savage the \$2,000.00 without bargaining with ETA. The School District's subsequent decision to issue a check to Savage before, at the time of, or after, Savage had signed his employment contract is irrelevant to our determination of whether the School District committed an unfair labor practice.

¶18 The School District asserts next that BOPA erred in concluding the \$2,000.00 materially or significantly affected current employees because "[t]he record is completely devoid of any evidence establishing that the payment to Savage was made in connection with a tentative offer of employment." The School District appears to argue that it gifted the \$2,000.00 to Savage in order to encourage his good will toward the School District, thereby making him more amenable to any future offers the School District might make.

¶19 We agree with BOPA's conclusion that "it is inherently incredible that Northrop agreed to give \$2,000.00 . . . to an applicant for employment without some understanding . . . that he would actually come to work for the districts." The School District admits that Northrop paid Savage \$2,000.00 after Savage had interviewed for the position, after

the School District had decided that “Savage was the best candidate for the position,” and after Northrop had informed Savage of the salary and benefits associated with the position. These facts are sufficient to support BOPA’s conclusion that the \$2,000.00 related to an offer of employment.

¶20 Roberts’s testimony also supports BOPA’s conclusion that the School District provided the \$2,000.00 to Savage in connection with a tentative offer of employment. Roberts testified that Northrop made her a tentative offer of employment before the Board of Trustees gave any official approval. Roberts also testified that she asked for a reimbursement of moving expenses from Northrop, but he declined her request on the ground that he could not pay her more than the salary provided for in the collective bargaining agreement. BOPA reasonably inferred from this testimony that Northrop made a similar tentative offer of employment to Savage and that Northrop had included compensation that went beyond the salary provided in the CBA.

¶21 Finally, the School District points out that, in affirming BOPA’s legal conclusions, the District Court appears to hold that the School District violated the CBA between ETA and the School District. In light of this holding, the School District argues that the District Court should have dismissed this case because ETA had failed to “pursue the mandatory grievance procedure set forth in the CBA.”

¶22 We agree with ETA that the School District bases its argument on a single “inapt phrase” near the end of the District Court’s Decision and Order. The District Court correctly affirmed BOPA’s conclusions of law, noting that the \$2,000.00 payment to

Savage “vitally affected” the terms and conditions of ETA members’ employment. Any conclusion that the District Court may have made regarding the CBA agreement constitutes harmless error. *Hall v. State*, 2006 MT 37, ¶ 21, 331 Mont. 171, ¶ 21, 130 P.3d 601, ¶ 21.

¶23 Affirmed.

/S/ BRIAN MORRIS

We Concur:

/S/ KARLA M. GRAY
/S/ JOHN WARNER
/S/ JAMES C. NELSON
/S/ JIM RICE